

D.P.U. 90-DS-61

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by John Mahoney Construction Company, Incorporated.

APPEARANCES: Harold Kane, Contract Administrator
J. Mahoney Construction, Inc.
25 Bryant Avenue
Milton, Massachusetts 02186
FOR: J. MAHONEY CONSTRUCTION, INC.
Respondent

Henry Cappuccio, Engineer
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE
ENGINEERING AND SAFETY

I. INTRODUCTION

On August 10, 1990, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to the John Mahoney Construction Company ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on July 25, 1990 in Public Alley 425, Boston, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precautions, causing damage to an underground pipe operated by Boston Edison Company ("Boston Edison" or "Company"). The NOPV also stated that the Respondent had the right to either appear before a Department hearing officer in an informal conference on September 11, 1990, or send a written reply to the Department by that date.

On November 1, 1990, the Respondent replied by letter, stating that it had not violated the Dig-Safe Law. In that letter, the Respondent stated that it had obtained a proper Dig-Safe number and that avoiding damage was impossible. In a letter dated September 11, 1991, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing.

On September 20, 1991, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07 (3). After due notice, an adjudicatory hearing was held on March 12, 1992. At the hearing, no representative appeared in behalf of the Respondent. Due to the Respondent's failure to appear, the hearing was cancelled.

On March 13, 1992 the Department sent a letter to the Respondent informing it that a second hearing had been scheduled for April 14, 1992, and that a failure to attend this hearing

would result in a dismissal of the Respondent's appeal. On April 14, 1992, after due notice, an adjudicatory hearing was held pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq.

At the hearing, Henry Cappuccio, a utility engineer for the Division, appeared on behalf of the Division. John Kingston, the Company's supervisor in charge of Dig-Safe, testified in behalf of the Division. Harold Kane, a contract administrator for the Respondent, testified for the Respondent. All exhibits offered were moved into evidence by the Department.

II. SUMMARY OF FACTS

A. The Division's Position

The underground damage report offered by the Division indicates that the Respondent damaged a Company cable within a conduit in Public Alley 425 in Boston (Exh. D-1). The Division alleged that the Respondent had failed to maintain the Company's markings, and had failed to use reasonable precautions to prevent damage to underground facilities while excavating (Tr. at 7-8). With respect to the second allegation, the Division asserted that the Respondent should have used hand-digging to expose utilities and determine their location before excavation (id. at 28, 30).

Mr. Kingston testified that he had visited the site where the damaged occurred personally (id. at 8). Mr. Kingston also testified that the Company's markings were faded, yet still visible when he visited the site (id. at 9-10). He stated that, to his knowledge, the Respondent had not contacted the Company to request Company personnel for assistance during the excavation (id. at 9, 13).

Mr. Kingston stated that the Respondent had damaged a Company conduit and the cable within that conduit (id. at 10). He also stated that the cable had been forcibly pulled so that it became severed, and was not sliced or cut (id. at 11-12). He further stated that the damaged caused to the facilities required the force of a machine, and could not have occurred by hand (id. at 12).

Mr. Kingston contended that the Respondent had excavated too deeply while lifting a curbstone, thereby lifting the facilities with the curbstone and damaging them (id. at 11). Mr. Kingston stated that the curbstone was not placed in a cement base, and that the damaged facilities were not inadvertently attached to the curbstone (id. at 13-14). In addition, he asserted that if the curbstone had been lifted by itself, the damage would not have occurred (id. at 14).

B. The Respondent's Position

Mr. Kane testified that he had not visited the site where the damaged occurred (id. at 22-23). Mr. Kane contended that the Respondent's presence at the site had been continuous for the duration of the excavation (id. at 25). He pointed out that the Division's witness had testified that the markings at the site were visible, and that therefore, no call for a remarking from the Respondent was necessary (id. at 20).

Mr. Kane contended that the facilities that were damaged were old and virtually obsolete, and inferred that the lines would have had to be replaced regardless of the damage (id. at 21). In support of his inference, he stated that rather than replacing only the damaged portion of the cable, the Company replaced the entire street with new cable (id. at 21).

Mr. Kane asserted that excavators should be able to assume that properly marked facilities

are also at the proper depth (id. at 22). However, Mr. Kane admitted that he was aware that there are no requirements for proper depths of facilities in the Dig-Safe Law (id. at 23). He also admitted that he was not aware of whether the Respondent used hand-digging during its attempt to locate underground facilities (id. at 28). Finally, Mr. Kane asserted that the Division had not shown any negligence on the part of the Respondent, and that damage alone was not enough to prove negligence (id. at 20-21).

III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in this area. Several recent cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc., D.P.U. 89-DS-15 (1990); Petricca Construction Company, D.P.U. 88-DS-31 (1990); John Mahoney Construction Co., D.P.U. 88-DS-45 (1990); Northern Foundations, Inc., D.P.U. 87-DS-54 (1990). However in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp.,

D.P.U. 91-DS-2 (1992).

A variation in depth does not relieve an excavator from the duty to use reasonable precautions. Fed Corp, *supra*; Amorello, D.P.U. 89-DS-61 (1990). However, the depth of an underground facility may be relevant in certain cases when that depth may have limited the precautions an excavator could have taken to protect underground facilities. Amorello & Sons, D.P.U. 87-DS-148, at 7-8 (1993); New England Excavating, D.P.U. 89-DS-116, at 6-7 (1993).

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. New England Excavating, *supra*, at 9; Fed. Corp., *supra*, at 5-6. In specific instances where there has been an allegation of a failure to exercise reasonable precaution without demonstrations of precautions the excavator could or should have taken, the Department has found that the mere fact of damaged will not be sufficient to constitute a violation of the statute. Umbro & Sons, D.P.U. 91-DS-4 (1992); Fed. Corp, *supra*; Albanese Brothers, Inc., D.P.U. 88-DS-7 (1990).

G.L. c. 82, § 40 also states:

After a company has designated the location of such pipes, mains wires and conduits at the locus of the excavation in accordance with the provisions of this section, the excavator shall be responsible for maintaining the designation markings at such locus, unless the said excavator requests re-marking at the locus due to obliteration, destruction or other removal of such markings and the company shall then have twenty-four hours following the receipt of such request to remark such locus.

The Department has consistently found that excavators are responsible for maintaining utility designation markings. Linden Construction Company, D.P.U. 87-DS-149 (1991). The

responsibility attaches after the utility companies have marked the location of their underground facilities at the excavation site named in the Dig-Safe request. Warner Bros., Inc., D.P.U. 87-DS-124 (1990). The Dig-Safe Law states that excavators must call for a remarking if markings are no longer visible or have been inadvertently moved. Lachance Excavating Company, Inc., D.P.U. 87-DS-178 (1990). Even in circumstances where no damage occurs, the failure of an excavator to maintain markings is considered a violation of the Dig-Safe Law. Warner Bros. Inc., *supra*.

III. ANALYSIS AND FINDINGS

The issues to be decided in this case are whether the excavator failed to (1) maintain markings and call for a remarking, and (2) exercise reasonable precautions during excavation.

In addressing the first issue, the Division's witness testified that although the original markings were faded, they were still visible. The Division presented no evidence that the markings were obliterated or removed in any other way. Therefore, because the markings were visible after the damage, the Department finds that the markings were adequately maintained by the Respondent. Because the markings were adequately maintained by the Respondent, there was no need for the Respondent to call the Company for a remarking of the site. Accordingly, the Department finds that the Respondent was not in violation of the Dig-Safe Law for a failure to maintain markings or call for a remarking.

In addressing whether the Respondent used reasonable precautions during excavation, the Division stated that if hand-digging had been used by the Respondent to locate the underground facilities, the damage would not have occurred. The Division's witness stated that the damage

was caused with a machine and could not have been caused by hand. The Respondent did not controvert this evidence. The Respondent's witness did not visit the site and could not indicate whether a machine or hand-digging had been used to excavate at the site.¹

In specific instances where there has been an allegation without demonstrating further precautions that could or should have been taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Fed. Corp., supra; Albanese Brothers, Inc. v. Colonial Gas Company, D.P.U. 88-DS-7 (1990). Adequate support or evidence must accompany any allegation that an excavator failed to exercise reasonable precautions in order for the Department to justly construct a case against the alleged violator. Fed. Corp., supra.

In the instant case, the Division adequately demonstrated that the Respondent failed to exercise reasonable precautions when the Respondent failed to hand-dig to locate the underground facilities prior to excavation. The Respondent did not refute the Division's evidence. Accordingly, the Department finds that the Respondent failed to exercise reasonable precautions when excavating on July 25, 1990 in Public Alley 425, Boston, Massachusetts, in violation of the Dig-Safe Law.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That J. Mahoney Construction, Incorporated, violated the Dig-Safe Law when it failed to exercise reasonable precautions while excavating on July 25, 1990 in Public Alley 425,

¹ The Respondent's argument that the damaged facilities were old and would have been replaced soon regardless of the damage is irrelevant. The Dig-Safe Law applies to all underground facilities, regardless of age or condition.

Boston, Massachusetts; and it is

ORDERED: That J. Mahoney Construction, Incorporated, being a repeat violator of the Dig-Safe Law, shall pay a civil penalty of \$500 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this order.

By Order of the Department,